No. 79-2065

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEONARD HORWITZ,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF AND APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

Petitioner, Leonard Horwitz ("Horwitz"), filed his Petition for Writ of Certiorari with this Court on June 27, 1980. Horwitz files this supplemental brief to bring to the Court's attention a further decision by the District Court which bears directly on the issues presented in his Petition.*

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* This recent opinion is reproduced in an Appendix to this brief (1a-6a). Reference to this opinion will appear herein as *Opinion,* followed by the Appendix page reference.

Further Opinion Below

The Court of Appeals issued its Mandate on July 9, 1980* directing the District Court to reconsider its August 15, 1979 opinion granting Horwitz a new trial. On December 8, 1980, the District Court reinstated the conviction below finding that the Court of Appeals decision in *United States* v. *Turkish*, 623 F.2d 769 (2d Cir. 1980)** required that result (*Opinion*, 2a). In its decision on remand the District Court adhered to its original conclusion that "Horwitz's trial was unfair, and that Horwitz's due process rights were violated for the reasons formerly stated" in its original decision ordering a new trial*** (*Opinion*, 4a).

ARGUMENT

The District Court's Continued Belief That Horwitz Was Denied a Fair Trial and Its Inability to Remedy That Deprivation Under the Standard Established by the Court of Appeals Underscores the Appropriateness of Review by This Court.

As a result of the *Turkish* standard the District Court believed it could not remedy, in the circumstances of the case before it, a most basic guarantee of our constitutional system—the right to a fair trial conducted in accordance with due process of law. The Court found that *Turkish* provided it with no option other than reinstatement of

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* Horwitz's request to the Court of Appeals for a stay of its Remand Mandate was denied on July 9, 1980 (*Opinion*, 2a).

** The *Turkish* decision is reproduced in Appendix C to Horwitz's Petition for Certiorari (27a-51a).

*** The District Court's original decision is reproduced in Appendix B to Horwitz's Petition for Certiorari (11a-26a).

Horwitz's conviction even where this basic guarantee was not afforded.

> *Turkish,* as I read the opinion, requires the summary rejection of 'claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution', *id.* at 778 [App. C 47a].
>
> (*Opinion,* 5a)

Noting that *Turkish* forbids a hearing on such status and requires only a showing by the prosecutor that "the witness has been indicted", or the presentation "in camera [of] an *ex parte* affidavit setting forth the circumstances that support the prosecutor's suspicion of the witness's criminal activity" [id.], the Court stated:

> I must assume that this action was remanded solely to inquire with respect to the existence of such an investigation, since my determination with respect to the fairness of the Government procedure as far as Horwitz was concerned was clear in my prior opinion. Here, where one of the potential defense witnesses is under indictment and the Government's *ex parte* submission indicates that both are under continuing investigation, I am required, I believe, to reject Horwitz's request that those potential witnesses be immunized. Since the new trial order was based on the possibility of such immunity grants, that order must be vacated.
>
> (*Opinion,* 5a-6a)

The District Court emphasized that the significance of the testimony which the two proposed witnesses could have provided to Horwitz went to the core of due process protection:

> An additional important factor in this case is that Horwitz's proposed defense witnesses both testified before the grand jury, and their testimony was exculpatory of Horwitz. In determining whether a prosecutor's failure to disclose exculpatory evidence to the defense gives rise to error of constitutional dimension requiring the granting of a new trial, the Supreme Court has looked to the possible creation of reasonable doubt as the dispositive factor. *See United States* v. *Agurs,* 427 U.S. 97, 112-13 (1976). In my opinion, the same consideration should be controlling here.
>
> (*Opinion,* 3a, n.1)

Following the remand, the Government advised the District Court *ex parte* that its investigation of both defense witnesses was "continuing," *Opinion,* 4a.* The District Court stated that its original conclusion that refusal to permit use immunity to the defense witnesses was unfair to Horwitz was "strengthen[ed]" by "the nature of that investigation and the facts established in the Horwitz trial . . . completely apart from the effect of such an immunity grant upon any future action by the Government against Weiss and Emmett," *id.* The Court's inability to fashion a remedy consonant with its finding that Horwitz was denied a fair trial because of the *Turkish* holding could not be clearer—notwithstanding its unique competence to determine that due process was denied.

Having presided at both trials, observed the demeanor of the Government's chief witnesses, reviewed the grand jury testimony of the proposed defense witnesses, and re-

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* This investigation was in progress as early as December, 1977 when Brodsky was attempting to secure his broad immunity grant [App. A, 19a].

ceived the Government's various *ex parte* submissions, the Court's adherence to its finding that due process was absent here is compelling indeed.* Yet, despite this traditional judicial expertise, the Court has been precluded from performing its historic corrective function. *See* Petition, pp. 15-17. As the District Court observed, *Turkish* renders due process rights illusory when their violation can be found by the Court but the Government nonetheless prevents remediation:

> The Court of Appeals in *Turkish* does indicate that in certain circumstances not to employ use immunity for defense witnesses may result in a due process violation, yet it does not permit that consideration to be taken into account by a trial court faced with a defense witness immunity request if the witnesses involved are under indictment or criminal investigation. *See id.* at 777, 778 [43a-47a]. *Opinion,* 5a.**

In sum, the District Court's opinion forcefully reinforces the need for this Court's resolution of the issues presented in the Petition for Certiorari herein.

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* Significantly, the Government itself recognizes that defense witness immunity is appropriate " 'in extraordinary circumstances where the defendant plainly would be deprived of a fair trial without such testimony. *United States Attorneys' Manual* §1-11.230, at 13 (Jan. 14, 1977).' " Brief for the United States in Opposition, p. 7. Here, although the District Court has reached this very conclusion, *Turkish* requires denial of this grant where the Government disagrees with that conclusion.

** The District Court rejected the contention that "the potential impact on the Government in some future prosecution" would affect the fairness of the trial here. *Opinion,* 4a. *See* Brief for the United States in Opposition, pp. 8-9. The District Court found that "the effect of such immunization upon the Government would not be great, for steps could be taken to protect future prosecution from taint," and outlined a variety of measures which could have been employed toward that end. *Opinion,* 4a-5a.

CONCLUSION

For all the reasons set forth herein and in the Petition for Certiorari it is respectfully requested that the writ be granted.

Respectfully submitted,

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January, 1981

APPENDIX

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Cr. 401 (RWS)

UNITED STATES OF AMERICA,

—against—

LEONARD HORWITZ,

Defendant.

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SWEET, D.J.

This criminal action against Leonard Horwitz ("Horwitz") is before me on remand from the Court of Appeals,

whose directive calls for reconsideration of my opinion dated August 15, 1979, 476 F. Supp. 775, in light of *United States* v. *Turkish*, 623 F.2d 769 (2d Cir.), *petition for cert. filed*, 49 U.S.L.W. 3251 (U.S. Oct. 7, 1980) (No. 80-436). *See United States* v. *Horwitz*, No. 79-1343 (2d Cir. May 29, 1980), *petition for cert. filed*, 49 U.S.L.W. 3009 (U.S. July 15, 1980) (No. 79-2065).

Horwitz has asked that any action on this case be stayed until after the Supreme Court acts on his petition for a writ of *certiorari*. A similar request was made to the Court of Appeals; that request was denied on July 9, 1980. Horwitz's request to this court is denied as well.

My understanding of *Turkish* requires me to vacate my prior order for a new trial of this case, and reinstate the jury's verdict. The sentencing of Horwitz will take place at a time to be set by the court, within forty-five days of entry of this opinion.

The factual background necessary to an understanding of this matter is set forth in the opinions of this court and of the Court of Appeals cited above. Briefly, Horwitz was found guilty after a jury trial on nine counts of fraud in the sale of securities, one count of conspiracy to commit such fraud, and one count of endeavoring to obstruct a grand jury investigation. The evidence against him consisted in large part of testimony by two Government witnesses endowed with broad grants of immunity as a result of their agreement to cooporate with the prosecution.

After trial, Horwitz filed a timely motion for a judgment of acquittal pursuant to Rule 29, Fed.R.Crim.P., or, in the alternative, for a new trial pursuant to Rule 33. Horwitz challenged his conviction on due process grounds. His main argument was that his constitutional rights had

been infringed by the combined effect of the Government's refusal to immunize two potential defense witnesses and its own heavy reliance on testimony given pursuant to immunity grants. The proposed defense witnesses were unavailable to Horwitz without a grant of immunity because both were potential targets of prosecution themselves, and both invoked the protection of the Fifth Amendment. In the context of this case, I found the Government's conduct of the trial had rendered it unfair. I concluded that:

> While the government need not in every circumstance grant immunity to potential defense witnesses, here, where the foundation of the government's case against Horwitz was built by means of a far-reaching immunity grant, and where the evidence sought by the defense is affected by the government's continuing investigation of the potential defense witnesses, the denial of limited use immunity resulted in an unfair trial.

476 F. Supp. at 781.[1] In an effort to remedy this due process violation, I ordered a new trial, during which the testimony of one of the Government's immunized witnesses was to be excluded unless the Government extended immunity to the proposed defense witnesses.

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[1] An additional important factor in this case is that Horwitz's proposed defense witnesses both testified before the grand jury, and their testimony was exculpatory of Horwitz. In determining whether a prosecutor's failure to disclose exculpatory evidence to the defense gives rise to error of constitutional dimension requiring the granting of a new trial, the Supreme Court has looked to the possible creation of reasonable doubt as the dispositive factor. *See United States* v. *Agurs*, 427 U.S. 97, 112-13 (1976). In my opinion, the same consideration should be controlling here.

On remand, I still find that Horwitz's trial was unfair, and that Horwitz's due process rights were violated, for the reasons formerly stated. Of particular importance is the fact that immunity was granted to Bodsky, the key prosecution witness against Horwitz, only after he had embarked on extensive efforts to obtain Horwitz's participation in an obstruction of justice.

The use immunity sought for Horwitz's witnesses, Jay Emmett ("Emmett") and Solomon Weiss ("Weiss") was refused by the Government because of an investigation into their activities pending at the time of the Horwitz trial late in 1978 and early in 1979. Subsequently, the Government indicted Emmett; in an *ex parte* submission, the Government has indicated that a criminal investigation of both men is continuing. The nature of that investigation and the facts established in the Horwitz trial strengthen my conclusion that the refusal of the Government to permit use immunity was unfair to Horwitz, completely apart from the effect of such an immunity grant upon any future action by the Government against Weiss and Emmett.

The potential impact on the Government in some future prosecution in no way effects the fairness of the trial which Horwitz received. Further, the effect of such immunization upon the Government would not be great, for steps could be taken to protect future prosecutions from taint. For example, the relevant transcript could be sealed, the Assistant United States Attorney assigned to prosecute Emmett and Weiss could be required to be absent during the use immunized testimony and during any argument relying on that testimony, records of the investigation into Emmett and Weiss up to the time of their trial testimony could be isolated and preserved to guard against allega-

tions of taint, and other steps suggested by the Government could be undertaken, if need be, pursuant to court order.[2] If a balance of hardships were the appropriate test in a criminal prosecution, in my view that balance would tilt markedly in Horwitz's favor.

The Court of Appeals in *Turkish* does indicate that in certain circumstances not to employ use immunity for defense witnesses may result in a due process violation, yet it does not permit that consideration to be taken into account by a trial court faced with a defense immunity request if the witnesses involved are under indictment or criminal investigation. *See id.* at 777, 778.

Turkish, as I read the opinion, requires the summary rejection of "claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution," *id.* at 778. Under *Turkish,* "[n]o hearing should be held to establish such status. The prosecutor need only show that the witness has been indicted or present to the court *in camera* an *ex parte* affidavit setting forth the circumstances that support the prosecutor's suspicion of the witness's criminal activity." *Id.*

I must assume that this action was remanded solely to inquire with respect to the existence of such an investigation, since my determination with respect to the fairness of the Government procedure as far as Horwitz was concerned was clear in my prior opinion. Here, where one of the potential defense witnesses is under indictment and the Government's *ex parte* submission indicates that both are under continuing investigation, I am required, I believe, to reject

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[2] In this case, such an arrangement would cause the Government minimal hardship. Two Assistant United States Attorneys participated in Horwitz's prosecution. They could divide the labor between themselves, and there would be no need for an Assistant unfamiliar with the case to undertake the trial of any of these men.

Horwitz's request that those potential witnesses be immunized. Since the new trial order was based on the possibility of such immunity grants, that order must be vacated.

The new trial order is vacated; the jury verdict is to be reinstated.

IT IS SO ORDERED

Dated: New York, N.Y.
December 8, 1980

/s/ ROBERT W. SWEET
U.S.D.J.